555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

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February 25, 2019

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Connect America Fund*, WC Docket No. 10-90

Dear Ms. Dortch:

Viasat, Inc. ("Viasat") responds to the letter[1] filed by Hughes Network Systems, LLC ("Hughes") on February 4, 2019 regarding the two parties' pending petitions for reconsideration of the *Performance Metrics Order*.[2] The Hughes letter largely reiterates arguments appearing in Hughes's opposition to Viasat's petition and a letter Hughes filed on December 7, 2018. Viasat has already addressed those arguments in detail in its reply submitted on November 19, 2018 and in its letter dated December 18, 2018.[3]

Hughes's repetition of its claim that the relief Viasat seeks involves "primary retroactivity" simply does not make it so. Courts have explained that "primary retroactivity" occurs when an agency rule reaches back to alter the legal consequences of past actions.[4] Here, by contrast, the relief requested by Viasat would clarify the performance testing regime for purposes of *future*

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[1] *See* Hughes Network Systems, LLC, Letter, WC Docket No. 10-90 (filed Feb. 4, 2019) ("Hughes Letter").

[2] *Connect America Fund*, WC Docket No. 10-90, Order, DA 18-710 (WCB, WTB, OET rel. July 6, 2018) ("*Performance Metrics Order*").

[3] *See* Reply of Viasat, Inc. in Support of Its Petition for Reconsideration, WC Docket No. 10-90 (filed Nov. 19, 2018); Viasat, Inc., Letter, WC Docket No. 10-90 (filed Dec. 18, 2018) ("Viasat Letter").

[4] *See Regents of the Univ. of Cal. v. Burwell*, 155 F. Supp. 3d 31, 47 (D.D.C. 2016) ("Primary retroactivity occurs when a regulation 'alter[s] the *past* legal consequences of past actions'") (emphasis in original) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring)).

compliance.[5] Moreover, Hughes's repeated effort to characterize the testing regime as a "gating criterion" for auction participation does not meaningfully advance its argument.[6] Service rules and buildout requirements for auctioned wireless services are no less "gating criteria" for participation in spectrum auctions. And as Viasat has explained, the D.C. Circuit in *Mobile Relay Associates v. FCC* held that the Commission may alter such rules and requirements after an auction has occurred.[7] Indeed, the upshot of Hughes's objection is that the FCC could *never* change previously announced rules governing auctioned services after the auction has taken place—a result that would significantly hamstring the Commission's flexibility to hone its rules in a manner that best serves the public interest.

Put another way, participating in an auction can be likened to operating a business that is subject to certain rules and requirements—say, a nail salon that must comply with rules for training and licensing nail technicians, certification requirements, and the like. Inevitably, some individuals will decide to open nail salons under the applicable set of rules and regulations, and others will view the rules as too burdensome and decide not to open a nail salon. If a governing authority—say, a city council—later decides to change the applicable rules for operating a nail salon, such that nail technicians no longer require certain training or licensing, no one would claim that such an outcome involves some prohibited form of retroactivity. The fact that some individuals chose not to enter the nail salon business because of the then-existing rules does not mean that the rules can never be changed going forward.[8] Similarly, Viasat is requesting that the Commission modify or clarify certain rules that apply to performance testing for CAF II recipients on a going-forward basis. Here, too, the fact that Hughes chose not to participate in the auction does not mean that the performance testing rules can never be changed going forward. By contrast, and to continue the analogy, an example of "primary retroactivity" would be if the city council had never imposed rules on nail salons, then changed course and enacted an ordinance declaring that, as of two years prior to the date of the ordinance, all nail salons must have held certain certifications, and those salons lacking the certifications would face a fine for that two-year period. If the Commission were to impose requirements on CAF II recipients that similarly affect the legal consequences of past conduct, that may well constitute "primary retroactivity," but that is plainly not what Viasat is asking the Commission to do.

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[5] *See Performance Metrics Order*, Appendix A ("The first performance measures data and certification will be due by July 1, 2020 and shall include data for the third and fourth quarters of 2019.").

[6] Hughes Letter at 3.

[7] *See* Viasat Letter at 2; *Mobile Relay Associates v. FCC*, 457 F.3d 1, 10 (D.C. Cir. 2006) (holding that a regulatory change "that upsets expectations . . . may be sustained if it is reasonable").

[8] *See Landgraf v. Usi Film Prods.*, 511 U.S. 244, 293 n.3 (1994) (Scalia, J., concurring) (explaining that "a new law banning gambling [that] harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards" would be similarly "uncontroversial[]," and that, if such changes in the law that upset prior expectations were prohibited, "the whole body of our law would be ossified forever" (internal citations and quotation marks omitted)).

Accordingly, Hughes's letter, like its opposition and its prior letter, provides no basis for denying Viasat's petition for reconsideration. Please contact the undersigned with any questions regarding this submission.

Respectfully submitted,

/s/

John P. Janka
Matthew T. Murchison

cc: Kirk Burgee
Randy Clarke
Chelsea Fallon
Thomas M. Johnson, Jr.
Sue McNeil
Alexander Minard
Linda Oliver
Ryan Palmer
Arielle Roth
Stephen Wang
Preston Wise
Suzanne Yelen
Cathy Zima